Supreme Court of the United States

OCTOBER TERM, 1923.

No. 84

THE MATTHEW ADDY COMPANY,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF PETITIONER.

NELSON B. CRAMER,
JULIUS R. SAMUELS,
(both of Cincinnati, Ohio,)
Attorneys for Petitioner.

TOOTHAKER & RODENFELS, Law Printers, Columbus, Ohio

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Supreme Court of the United States

No. 494.

THE MATTHEW ADDY COMPANY,
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vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF PETITIONER.

PRELIMINARY STATEMENT.

This cause comes before the court on a writ of certiorari issued out of this court to the United States Circuit Court of Appeals for the Sixth Circuit, to certify the record in this cause to this court.

This proceeding is to review a judgment of the District Court of the United States for the Southern District of Ohio, Western Division (Peck, J.), entered June 24, 1920 (R., 26), whereby, upon a verdict of guilty (R., 23), and overruling a motion for a new trial (R., 26) and a motion in arrest of judgment (R., 27), the court sentenced the petitioner, defendant below, to pay a fine of one thousand ($1000.00) dollars and costs. (R., 26.)

The case was then taken to the United States Circuit Court of Appeals for the Sixth Circuit on a writ of error, and the judgment of the District Court was affirmed on May 4, 1922, (R., 89) reported in 281 Fed., 298. Thereafter a writ of certiorari was issued out of this court, on motion of petitioner.

STATEMENT OF THE CASE.

The indictment, upon which petitioner was found guilty, was in twenty-three counts, and alleged that, under the act of Congress of August 10, 1917, (40 Stat., 278; Comp. St. 1919, Sec. 3115¼q), commonly known as the "National Defense (Lever) Act," and especially Sections 1, 2, 3, 4 and 25 thereof, the President, being authorized by the terms of said act to make regulations and issue orders fixing the price of coal, and to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment or storage thereof among dealers or consumers, on August 23, 1917, issued an executive order, in which it was provided, among other things, that:

> "1. A coal jobber is defined as a person (or other agency) who purchases and re-sells coal to coal deal-

ers or to consumers without physically handling it on, over or through his own vehicle, dock, trestle or yard.

2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin in excess of 15c per ton of 2000 lbs., nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal, exceed 15c per ton of 2000 lbs." (See General Orders, Regulations and Rulings of the United States Fuel Administration, p. 444; Appendix, p. 23.....)

The indictment then alleges that during the months of September, October and November, 1917, a state of war was then existing between the United States and the Imperial German Government, and the law, orders and regulations above stated being then in force, defendant, The Matthew Addy Company, was engaged, in business in the city of Cincinnati, Hamilton county, Ohio, as a coal jobber, as defined in said executive order.

These preliminary statements contained in the first count are incorporated by reference into each of the other twenty-two counts, and each count then alleges a specific sale of coal by defendant company in supposed violation of the provisions of the act of Congress of August 10, 1917, and said executive order. The allegations of the second count (we omit the first because it was found that the court had no jurisdiction thereof, and it was dismissed) being that:

"Said The Matthew Addy Company, acting in its capacity as a coal jobber, as aforesaid, wilfully, unlawfully, knowingly and feloniously did ask, demand and receive from Fred R. Kluckholn doing

business in Napersville, Illinois, for a certain quantity of bituminous coal, to wit, about 49.85 tons of 2000 lbs. each of Pocahontas run-of-mine coal, a price of three dollars and fifty ($3.50) cents per ton f. o. b. at the mines producing said coal, which said price of three dollars and fifty ($3.50) cents per ton included a profit or gross margin to it, said The Matthew Addy Company, as such coal jobber, as aforesaid, of twenty-five (25c) per ton, and which said profit or margin of 25c per ton was, and was well known by the said The Matthew Addy Company to be in excess of the profit or gross margin of 15c per ton of 2000 lbs. permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber; and the grand jurors further present that said The Matthew Addy Company did not have any contract with said Fred R. Kluckhohn, made in good faith prior to said 23rd day of August, 1917, in which said contract, the price for the purchase and sale of said coal was fixed," etc. (R. 3.)

Motion to quash the indictment and demurrer were overruled prior to the trial (R., 21, 23); reported in 263 Fed., 449; 265 Fed., 424.

For the convenience of the court there is printed at the end of this brief an appendix giving the sections of the Lever Act and the principal orders and regulations of the President and the United States Fuel Administrator, involved in this case.

ERRORS RELIED ON.

The assignment of errors appears at R. 68.

The first error of the court and fundamental question in the case is raised by the seventh assignment, which is as follows:

> "In charging the jury that defendant might be found guilty for violation of the order of the President of August 23, 1917, although the undisputed evidence showed that in respect to each transaction covered by the indictment, the coal had been purchased by The Matthew Addy Company prior to that day and prior to August 10, 1917." (R., 70.)

Second. The court erred in not permitting defendant to prove that the gross margin of 15 cents per ton added to its purchase price, "was confiscatory and compelled defendant to dispose of its product without allowance for expenses and a just compensation for its services."

If permitted to answer, the witness would have testified that in the month of September, in respect to gross sales of coal, in the month of September, 1917, they amounted to 25,315 tons.

That he had set off against the total amount of money received therefor all items of expense, to wit, the net direct expenses for coal sales, the net overhead expenses properly chargeable against coal sales, the coal sales expenses of the Chicago branch and the total expenses of net and overhead of the Chicago branch, and dividing the remainder by the number of tons found with the cost of coal sales in cents per ton for seven months was 17

cents and nine mills ($0.179). Upon the same computation for the month of October, 1917, that the cost of coal sales in cents per ton per month, was 18 cents and twenty-two mills ($0.1822); that applying the same computation to all coal sales of said company for the year 1917, he found the average selling cost to be 18 cents and 95 mills ($0.1895). That further for the year 1918, the average cost of actual coal sales of the company, in cents per ton per month, amounted to 17 cents and nine mills ($0.179). And for the year 1919, the average cost per month of actual coal sales of said company was 27 cents and six mills ($0.276); and for the months of January, February and March, 1920, the average cost was 19 cents and thirty-one mills ($0.1931).

Defendant offered the detailed statement prepared by the witness Frank C. Deckebach, dated May 17, 1920, covering said period from January 1, 1917, to March 31, 1920, showing all items, and made as aforesaid, from the original books, vouchers and other papers of said The Matthew Addy Company.

Defendant's counsel stated that said testimony and said analysis cost of coal sales was offered in evidence for the purpose of showing that defendant's price of $3.50 per ton upon the sales stated in the indictments did not include a profit, as alleged in the indictment, in excess of 15 cents per ton; and further, for the purpose of showing that said order of August 23, 1917, if it limited the gross price per ton upon the coal purchased prior to the order by defendant, to a maximum of 15 cents, was confiscatory and compelled defendant to dispose of his products without allowance for expenses and a just

compensation for his services. And further, said evidence was offered for the purpose of showing that said order so interpreted did not conform to the act of Congress and especially paragraph 15 of Section 25 therein, which provides that:

> "In fixing the prices for dealers, the commission shall allow the cost of the dealers and shall add thereto a just and reasonable sum for his profit in the transaction."

Said statement referred to in the testimony of the witness Frank C. Deckebach was submitted, marked for purpose of identification, "Defendant's Exhibit C." (See proffert at R. 57-58, and assignments of error 3 and 6, R. 70.)

Third. The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons urged in said motion. (R. 20.)

Fourth. The court erred in overruling the claims of defendant that the statute and the executive order, upon which the indictment was based, were, as construed by the court and applied to the undisputed facts, in violation of the several constitutional provisions specially relied on. (See demurrer to indictment, R. 21, and motion in arrest of judgment, R. 27.)

Fifth. The court erred in not directing a verdict for defendant, on the ground that the proof failed to sustain the indictment.

OUTLINE OF THE ARGUMENT.

I.

The court misconstrued the executive order upon which the indictment was based as applied to the undisputed facts.

II.

The court erred in not permitting defendant to show what were its costs and profits.

III.

The court erred in overruling the motion of defendant to quash the indictment and each and every count thereof, for the reasons, that—

(a) The indictment and each of its several counts is insufficient in law and fact.

(b) The allegations of the indictment are indefinite as to material matters and were not sustained by the evidence.

IV.

The court erred in overruling the demurrer of defendant to the indictment, which attacked the constitutionality of the Act of Congress of August 10, 1917, commonly known as the "National Defense (Lever) Act" (40 Stat., 278; Comp. Stat., 1919, Sec. 3115⅛ q.), and the executive order of the President, dated August 23, 1917, for the reasons, that—

(a) They violate the fifth amendment to the Constitution of the United States in that, defendant is deprived of its property without due process of law.

(b) The Act of Congress violates Section 1, of Article 1; Section 1 of Article 2, and Section 1 of Article 3 of the Constitution of the United States, in that it delegates legislative and judicial powers to the President of the United States, to the United States Fuel Administator appointed by the President, and the Federal Trade Commission.

(c) The Act of Congress violates clause 1 of Section 8 of Article 1, and clause 2 of Section 8 of Article 1, of the Constitution of the United States, in that it is an abuse of the power given to Congress to provide for the national security and defense.

(d) The Act of Congress violates the tenth amendment to the Constitution of the United States, in that it interferes with the rights of the respective states, as to regulation of industries within the states.

ARGUMENT.

I.

THE COURT MISCONSTRUED THE EXECUTIVE ORDER UPON WHICH THE INDICTMENT WAS BASED, AS APPLIED TO THE UNDISPUTED FACTS.

By Section 25 of the "National Defense (Lever) Act," approved August 10, 1921, it was provided:

> "That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, whenever and wherever sold, either by producer or dealer, to establish rules for the regulation of, and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary."

By an order issued August 21, 1917, effective that day, the President fixed a scale of prices for bituminous coal at the mines in most of the coal producing districts. The price fixed for the kind of coal involved in this case, to-wit: West Virginia run-of-mine was $2.00 per ton of 2,000 lbs. f. o. b. mines.

On August 23, 1917, the President issued an order fix-

ing the price on anthracite coal throughout the anthracite producing regions, to become effective September 1, 1917. The same order contained the "Jobber's Margin," and provided:

> "1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle or yard.
>
> 2. For buying and selling anthracite coal a jobber shall not add to his purchase price a gross margin in excess of 20c per ton of 2,240 pounds when delivery of such coal is to be effected at or east of Buffalo. For buying and selling anthracite coal for delivery west of Buffalo a jobber shall not add to his purchase price a gross margin in excess of 30c per ton of 2,240 pounds. The combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of anthracite coal for delivery at or east of Buffalo shall not exceed 20c per ton of 2,240 pounds, nor shall such combined margins exceed 30c per ton of 2,240 pounds for the delivery of anthracite coal west of Buffalo. Provided that a jobber's gross margin realized on a given shipment or shipments of anthracite coal may be increased by not more than 5c per ton of 2,240 pounds when the jobber incurs the expense of rescreening it at Atlantic or lake ports for trans-shipment by water."
>
> (See General orders, regulations and rulings of the United States Fuel Administrator, p. 444; Appendix, p. [illegible].)

The evidence shows without dispute that defendant bought the coal July 31, 1917, for $3.25 per ton f. o. b. mines, or $1.25 per ton more than the price f. o. b. mines fixed by the President's order of August 21, 1917; and that it sold it in August and September for $3.50 per ton.

The plain meaning of the executive order of August 23, 1917, is, that after the going into effect of that order, a jobber is prohibited from adding to his purchase price a gross margin in excess of 15c per ton "for the buying and selling of bituminous coal" and the order has no application to a transaction whereby a jobber, having bought coal prior to August 23, 1917, sells it thereafter. In other words, the order must be construed as prospective only, and prospective in respect to all of its elements; that is to say, to both the buying and selling of a given lot of coal.

It appears from the several orders of the President, which were judicially noticed by the court, that on August 23, 1917, the President, under authority of the law, had adopted a comprehensive scheme, fixing the prices at the mines throughout the country, for both bituminous and anthracite coals, and in connection therewith, provided the jobbers' margins for "the buying and selling" of both classes of coal.

The court below either treated the words "buying and," in the phrase "for the buying and selling of," as if they were not included in the order, or else the court has given to the order a retroactive operation, by holding that the "buying" of a particular shipment by a jobber, which is an essential part of the offense and necessary to constitute it, may be punishable, although it occurred prior to the enactment of the law.

By the order of August 23, 1917, in the first section thereof, the President carefully defined coal jobbers, in a clause inserted only for the purpose of so defining those

words and complete in itself. Having thus defined, or described the persons (descriptio personae) who are capable of committing the specific offense, the President proceeded to define the acts which constitute the offense. Both in respect to the dealings in bituminous coal by a single jobber, or several jobbers, and in respect to dealings in anthracite at or east of Buffalo and anthracite west of Buffalo, in each case, by a single jobber, or several jobbers, he separately and distinctly provided that it was "for the buying and selling" that the jobber should add to his purchase price not more than a particular "gross margin."

In doing so the president must be supposed to have had in mind the nature of a jobber's business, and his necessary relationship to a given transaction. A jobber does not produce coal and sell it, but buys it and sells it. The transactions whereby he purchases, necessarily involve an expense to him just as much as do the transactions whereby he sells with the additional intermediate expense which results from carrying unsold coal, equal in any event to the loss of interest on the money invested. In respect to his business of purchasing and carrying he is entitled to his cost and compensation for his services.

Having these facts in mind, the president wisely and fairly treated the relationship between a jobber and a particular transaction, or to use the words of the order, his relation to "a given shipment or shipments" as a unit. No permissible legal construction of the order can be adopted, which attributes to the president an intention to limit a jobber to a gross margin in the selling of a

particular shipment, which might well be less than the expense already incurred by him in the purchase thereof, prior to the promulgation of the order.

In the present case and in many possible cases there might be shipments of coal in the hands of jobbers on August 23, 1917, theretofore purchased by them, in respect to which their expense connected with the purchase and carrying already exceeded the gross margin of 15c permitted by the order of that day. If the order of that day had the effect of compelling such jobbers to dispose of such shipments at a loss, or in the alternative, subject themselves to the penalties against "hoarding" provided in Section 26 of the law, the law itself would be open to grave constitutional objections. Whereas, no such objections could be raised, if the order is prospective only, and to be applied only to such jobbers as might see fit after the promulgation of the order, to engage in the business "of buying and selling."

We have already referred to the fact that by the two orders of August 21st and August 23rd, the president adopted a comprehensive schedule of prices for coal, both bituminous and anthracite, at the mines, throughout the country. We submit that the adoption of such a schedule of prices, taken in connection with the clear wording of clauses 2 and 3 of the order of August 23rd, shows that it was for the **buying and selling thereafter of coal,** the price of which at the mines was that day fixed, that the jobbers' margins were fixed.

This construction indicates a comprehensive, intelligible purpose, and gives effect to all the words of the order according to their plain English significance.

All of the sales by defendant, covered by the indictment were in the months of August and September, but the offense of which defendant was convicted was not the offense charged in the indictment or defined by any order in force in August and September, but was, if anything, an offense in violation of a subsequent order of October 6, 1917, of which paragraph 9 provided:

> "A jobber who, at the time of the President's order fixing the price of the coal in question at the mine (the order of August 21), had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917." (General Orders, Regulations and Rulings of the United States Fuel Administrator, p. .....; Appendix p. 82.....)

The issuance of the order of October 6th shows conclusively that prior to that day it was not considered an offense for a jobber who had purchased coal prior to August 23rd to sell the same at any price obtainable on the market.

The principle is well established that laws, especially laws creating crimes, are not to be given a retroactive effect unless the legislative intention that they shall have such effect is clear. This is especially true when the retroactive construction throws doubt upon the constitutionality of the law.

In the case of Shwab vs. Doyle, Collector of Internal Revenue, 258 U. S. 529, 42 Sup. Ct. Rep. 391, which in-

volved the question of retroactive construction of a law of the United States, this court held:

> "1. Laws are not to be construed as applied to cases which arose before their passage, unless that intent be clearly declared, since there is absolute prohibition against such laws when their purpose is punitive, and the situation which impells prohibition in such cases exacts clearance of declaration in other cases."

At page 534 of the opinion, this court said:

> "The Act of September 8, 1916, is within the condemnation. There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in United States vs. Heth, 3 Cranch 399, 413, etc.
>
> "If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

In the course of the opinion by Mr. Justice Harlan, in Chew Heong vs. United States, 112 U. S. 536, 559, it was said:

> "The courts uniformly refuse to give to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature. In United States vs. Heth, 3 Cranch. 398, 413, this court said, that 'words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;' and such is the settled doctrine of this court. Murray vs. Gibson, 15 How. 421, 423; Mc-

Ewen vs. Den, 24 How. 242, 244; Harvey vs. Tyler, 2 Wall. 328, 347; Sohn vs. Waterson, 17 Wall. 596, 599; Twenty Per Cent. Cases, 20 Wall. 179, 187."

See also opinion of Mr. Justice Day in White vs. U. S., 191 U. S., 545, at page 552.

Queen vs. Griffiths (1891), 2 Q. B. 145 involved the commission of a misdemeanor under a bankruptcy law, in which the conviction was reversed. Chief Justice Coleridge stated the principle governing such cases as follows:

"The question raised in this case is no doubt very capable of argument on both sides; but on the whole I think it is safer to hold that s. 26 of the Bankruptcy Act, 1890, is not retroactive in its operation, and that where a person is accused of an offense created by that Act, as applied to the Debtors Act, 1869, all the ingredients of the offense must have taken place before January 1, 1891, upon which date the Act of 1890 came into operation. I think that the words in s. 26 'shall have effect' must mean 'Shall have effect from January 1, 1891.' It is admitted that but for the alteration in the law effected by the 26th section, the acts committed by this defendant would not have constituted an offense, because they were committed before the presentation of a bankruptcy petition by himself; but it has been argued that the effect of s. 26 is to constitute those acts an offense. The question is, from what point of time does s. 26 take effect? I am of opinion that it takes effect from January 1, 1891. That conclusion is supported by the view that to give a retrospective effect to the statute would be to deprive the defendant of a defense upon which, at the time the acts complained of were committed, he was entitled to rely. It seems to me a very strong thing to hold that a defense which was open to a man at the time he did the acts complained of has been taken away by the retrospective operation of a subsequent statute. No authority in support of such a construction has been cited by us. I think it is safer

to hold that all the ingredients of the offense must have taken place before the Bankruptcy Act, 1890, came into operation, and I am therefore of opinion that this conviction cannot be sustained."

See also U. S. vs. Starr, Fed. Cas. No. 16379.

The learned trial judge was of opinion (see Ruling on Motion for a New Trial, R. 24) that because it was stated as a recital of fact in one of the orders of the Fuel Administration (Order of November 8, 1917) that the "coal mine output was largely contracted to be sold in advance," that the order of August 23rd, if not construed so as to penalize the sale by jobbers thereafter, of coal previously purchased by them, would leave it "open to the jobber to demand what he could get for his coal, and to thus carry on the injurious speculation, manipulation and private control of the supply which the Act was designed to prevent."

We submit that this is not a permissible method of legal reasoning for the construction of a law creating a criminal offense. There is nothing to indicate that when the order of August 23rd was issued, the President had any information concerning the amount of coal at the mines already contracted for, or whether the condition in fact existed on August 23rd. In any event, and even assuming that the condition did exist, by reason of the fact that only eleven days had elapsed since the passage of the Lever Law, and there had been no intervening investigation, it seems clear that he was not in possession of any such information.

As stated in the opinion of Circuit Judge Denison, in

One Truckload of Whisky vs. U. S., 274 Fed. 99; "The case is one for the application of the rule that a statute of this character, creating a new offense, should not be extended to include acts which may or may not have been within the legislative intent;" citing:

U. S. vs. Bathgate, 246 U. S. 220.
U. S. vs. Weitzel, 246 U. S. 533.

In the latter case Mr. Justice Brandeis, delivering the opinion of this court, at page 543 said:

> "Furthermore, a **casus omissus** is not unusual, particularly in legislation introducing a new system. The fact that in 1879 Congress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property entrusted to them, but not owned by the United States, shows both how easily a **casus omissus** may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. Todd vs. United States, 158 U. S. 278, 282; United States vs. Harris, 177 U. S. 305."

See also Lewis' Sutherland on Statutory Construction at Section 520.

In the case of Ex parte Bailey, 39 Fla. 76, the court stated:

> "A penal law must be construed strictly and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligibly described in its very words, as well as manifestly intended by the legislature, and where a penal statute contains such an ambiguity as to leave

> reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty, is to be preferred."

To say the least the law and the early rules and regulations of the President and the United States Fuel Administrator were ambiguous, difficult to interpret and were not clearly interpreted until the order of October 6, 1917, (General Orders, Regulations and Rulings of the United States Fuel Administrator p. ....., appendix p. 84) which was after the alleged offense charged in the indictment in this case. The violation, if there was any, on the part of petitioner was certainly not wilful as the evidence discloses, but merely because of the difficulty in interpreting the rulings of the Fuel Administrator. Immediately after the order of October 6th was issued, petitioner charged only 15 cents per ton as commission on the cars of coal purchased in July but remaining unsold at that time. The trial court ignored these facts entirely.

In the case of "The Schooner Enterprise," 1 Paine 32, at page 33, the court, in construing a penal statute, said among other things:

> "For although ignorance of the existence of a law be no excuse for its violation, yet if this ignorance be the consequence of an ambiguous or obscure phraseology, some indulgence is due to it. It should be the principle of every criminal code, and certainly belongs to ours, that no person be adjudged guilty of an offense unless it be created and promulgated in terms which leave no reasonable doubt of their meaning. If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally

incumbent on a judge not to apply the law to a case where he labors under the same uncertainty as to the meaning of the legislature. If this be involved in considerable difficulty from the use of language not perfectly intelligible, unusual circumspection becomes necessary—especially if the consequences be so penal as scarcely to admit of aggravation. When the sense of a penal statute is obvious, consequences are to be disregarded; but if doubtful they are to have their weight in interpretation. It will at once be conceded that no man should be stripped of a very valuable property, perhaps of his all—be disfranchised and consigned to public ignominy and reproach, unless it is very clear that such high penalties have been annexed by law to the act which he has committed. If these principles be correct, as they are deemed to be, a court has no option where any considerable ambiguity arises on a penal statute, but is bound to decide in favor of the party accused. 'It is more consonant to the principles of liberty,' says an eminent English judge, 'that a court should acquit when the legislature intended to punish, than it should punish, when it was intended to discharge with impunity.' "

II.

THE COURT ERRED IN NOT PERMITTING DEFENDANT TO SHOW WHAT ITS COSTS AND PROFITS WERE.

If we are right in our first contention, the judgment should be reversed and it will be unnecessary for the court to consider the other assignments of error. If we are not sustained in that argument, the question remains whether the defendant was not entitled to show that 15c per ton added as its commission to its purchase price resulted in loss or inadequate compensation.

The order of August 23, 1917, provides in terms that "For the buying and selling of bituminous coal, a jobber shall not add to his purchase price a gross margin in excess of 15c per ton." But the question is, whether the President had power under the law to limit the "gross margin" or commission of the jobber to a commission which resulted in no compensation adequate to the jobber's services, or as in this case to a loss because the selling price averaged less than the cost. This question was raised at the trial by the request for Special Charge No. 2 (R. 61):

> "If you find from the evidence that the gross margin of 15c per ton for jobbers as fixed by the President on August 23d, 1917, does not include defendant's costs of doing business and a just and reasonable sum for profit, then I charge you as a matter of law that you must return a verdict of 'not guilty.'"

This charge was refused and exception reserved and is preserved by the third assignment of error. (R. 70):

> "In sustaining the objection of counsel for the government to the defendant's offer to prove that the profit of The Matthew Addy Company, on each and every transaction upon which the indictment and the several counts thereof were based was not in excess of 15c per ton of 2,000 lbs."

And in the sixth assignment. (R. 70):

> "In charging the jury that the word 'profit' in the indictment, at each of the places where said word appears, was the equivalent of the words 'gross margin,' and in charging the jury that they might return a verdict against defendant in the absence of proof that The Matthew Addy Company made a profit per ton on the coal covered by the indictment, in excess of 15c."

The Government offered no evidence to show that any part of the commission or margin of 25c, added by defendant to its purchase price, was profit.

The defendant offered to show and had incorporated into the record in connection with the evidence of Frank C. Deckebach (R. 55), a certified public accountant, comprehensive tabulations from its books showing the cost and expense of its business in cents per ton, not only for the months covered by the indictment, but prior and subsequent thereto. (Schedules, R. 117 to 122.) In the nature of things it was impossible to distribute and allocate to the particular shipments involved in the indictment, the proper proportion of the company's total expenses rightly allowable as selling cost. But by a distribution of all costs against all sales, it was shown that for the month of July, 1917, the cost of selling a ton of coal was $.3425, or more than 9c over the total commission of 25c which the company added to its selling price of the coal purchased by it from Bluefield Coal and Coke Company for $3.25 per ton on July 31st, 1917, (Government Exhibits 1 and 2, R. 74). For the month of August, 1917, the company's selling cost per ton was $.1457, or a fraction of a cent less than the 15c per ton commission allowed by the executive order. For the month of September the company's selling cost per ton was $.1790, or nearly 3c in excess of the commission allowed. The evidence was rejected, the special charge refused, and the jury instructed that the results of the purchases and sales by defendant by way of profit or loss were immaterial.

We have already quoted, at page ....., the section of the act which authorizes the President to fix the price of coal and coke, and provides that such "authority and power may be exercised by him in each case through the agency of the Federal Trade Commission," etc. In overruling a motion to quash the indictment, the district judge held that the word "may" in this clause is permissive, and that the President is not required to exercise his authority to regulate the prices through the Federal Trade Commission; and the judgment below was a conviction upon the order of the President of August 23, not concurred in or promulgated by the Federal Trade Commission.

In order to properly construe the law it should be noted that where the Federal Trade Commission undertakes to fix prices, it must, under paragraph 11 of Section 25, "make full inquiry, giving such notice as it may deem practicable, into the cost of producing," etc., and that having completed such inquiry it shall (Par. 14):

> "In fixing maximum prices for producers * * * allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit;"

and in Paragraph 15 it is further provided that:

> "In fixing such prices for dealers, the Commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

The purpose and intent of the law as a whole was not to confiscate, during a public emergency, either the prod-

uct of the producer or the good will or services of the dealer or jobber, but to regulate prices after inquiry, and under the ordinary constitutional limitations. And even if it be true that the immediate emergency justified the President in fixing jobbers' prices, instead of adopting the slower method of submitting them to the Federal Trade Commission to be fixed upon investigation, we submit that the President, in exercising such power in emergency, was not free from the limitations imposed upon the Federal Trade Commission in the event that it should exercise the same powers by direction of the President.

We submit that where the President, without investigation, fixed a dealer's or jobber's price, without allowing "the cost to the dealer and adding thereto a just and reasonable sum for his profit," the dealer or jobber may show upon an indictment based upon Paragraph 17, for violation of an order of the President, that the price fixed by the order did in fact not allow "a just and reasonable sum for his profit in the transaction," but actually resulted in a loss.

III.

THE COURT ERRED IN OVERRULING THE MOTION OF DEFENDANT TO QUASH THE INDICTMENT AND EACH AND EVERY COUNT THEREOF.

(a) The Indictment and Each of its Several Counts, is Insufficient in Law and Fact.

The district judge, in his opinion of February 26, 1920, overruling defendant's motion to quash the indictment (R. 21), disposed of our first contention on this point in the following language:

> "The indictment is sufficient. The word 'may' in the last clause of the first paragraph of Section 25 of the National Defense (Lever) Act (40 Stat., 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. U. S. vs. Lexington Mill Co., 232 U. S., 399, and that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the Commission or otherwise." (R. 21.)

We submit that this construction of the law is not correct.

Paragraph one, which authorized and empowered the President to fix the price of coal and coke, and to establish rules for the regulation of and to regulate the method

of producton, sale, shipment, distribution, apportionment or storage, is a startling innovation in legislative action, due to the exigencies of war. If Paragraphs 1 and 17 had stood alone, without the inclusion of the intermediate paragraphs, the construction adopted by the District Court and approved by the Court of Appeals, might have been necessary, but reading the section as a whole we submit that there was no intention on the part of Congress to authorize the President to fix, without investigation or notice to be heard or appeal, either prices or jobbers' commissions on the sale of coal and coke. This is apparent from the provisions of the sections other than 1 and 17.

Paragraphs 2, 3 and 4 relate to the requisition of "the plant, business and all appurtenances * * * belonging to such producer as a going concern," and their operation during the period of the war.

Paragraph 3 provides that in case of such requisition "a just compensation for the use thereof" shall be paid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission, and paragraph 4 provides that in case of requisition, if the compensation fixed be not satisfactory to the owner, he shall, upon payment to him of 75% of the amount fixed, "be entitled to sue the United States to recover such further sum as, added to said seventy-five percentum, will make up such amount as will be just compensation."

Paragraphs 6, 7 and 8 provide an alternative to requisition of the plants of producers and dealers. That is, "an agency to be designated by the President," to which

producers shall sell their products, the prices to be fixed and regulated by such agency.

By paragraph 8 it is provided, that:

> "The prices to be paid for such products so purchased shall be based upon a fair and just profit over and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and costs of production to be determined by the Federal Trade Commission,"

with further provision that in case the owners are dissatisfied with the prices so fixed, they shall be paid seventy-five percentum of the amount, with the right to bring suit to recover the actual value of their product, to be determined by the courts.

Paragraphs 11, 12, 13, 14 and 15 prescribe the procedure whereby the President is to make inquiry into the cost of producing coal and coke, and paragraph 13 provides that "If the President had decided to fix the prices at which any such commodity shall be sold by producers and dealers generally" the Federal Trade Commission shall "fix and publish maximum prices for both producers of and dealers in any such commodity," etc.

Paragraph 17 provides a punishment for any one who, with knowledge that the prices of any such commodity have been fixed as therein provided, violates them.

The Federal Trade Commission is required by Sections 14 and 15, in fixing maximum prices, both for producers and dealers, to allow the cost of production, or service, and "add thereto a just and reasonable sum of the profit in the transaction." We submit that paragraph 1, properly construed, and considered as a part of the entire

statute, cannot be casually disposed of by merely defining "may" therein as permissive; that the proper construction of paragraph 1, conferring unusual powers upon the executive, also defined the only manner in which such powers could be exercised, and that the word "may" is equivalent, as it frequently is, to the word "shall," and refers to the special requirements of paragraphs 11, 12 and 13, inclusive, in providing the method whereby the President is authorized to fix prices for "producers or dealers."

Paragraph 16 strongly enforces our contention as to the proper construction of the statute. It reads:

> "The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of the maximum prices by the commission."

During the course of the trial it was recognized that this paragraph was applicable to the maximum commission fixed by the President, for violation of which defendant was indicted. But the paragraph did not undertake to preserve the inviolability of the contracts as against prices fixed by the President, but only as against prices fixed by the commission. If the Government's construction of paragraph 1 is correct, there would appear to be no sound rule of construction which would permit paragraph 16 to make an exception to the unlimited power conferred on the President by paragraph 1.

If our construction of the statute is correct, it follows that:

The indictment should allege the passage of the Act and the principal provisions thereof and then that the

President having decided to fix prices at which coal and coke might be sold, that the Federal Trade Commission fixed and published maximum prices for dealers in such commodities and that after such prices were fixed and published, defendant, with knowledge thereof violated same by asking, demanding and receiving higher prices than those fixed.

Nowhere in the indictment does it appear that the Federal Trade Commission fixed and published maximum prices and that defendant had notice thereof. If the Federal Trade Commission did not in fact fix and publish maximum prices and defendant did not in fact know or could not have known of any fixing of prices by it, then the defendant has violated no law and should not have been compelled to plead to any such indictment.

It is a well recognized rule in criminal pleading, that no material allegation may be omitted, for without it, a criminal offense is not described.

In the case of United States vs. Hess, 124 U. S. 483, at page 486, it was held:

> "The general, and with few exceptions, of which the present is not one, the universal rule on this subject, is, that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."
>
> See also Ledbetter vs. United States, 170 U. S. 606.

The rule just quoted applies equally to common law offenses as to statutory offenses. In an indictment for a purely statutory offense, the reason for the rule is all the more evident, for a common law crime may become

defined through legislative and judicial interpretation, besides the influence of public opinion regarding the law, during many years of its effectiveness.

In the case of United States vs. Cruikshank, et al., 92 U. S. 542, it was held:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species, it must descend to particulars. The object of the indictment is—first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

For the reason that essential and necessary allegations are not alleged in the indictment, we submit that the motion to quash should have been granted.

(b) The Allegations of the Indictment Are Indefinite as to Material Matters and Were Not Sustained by the Evidence.

The indictment fails to state an essential allegation, namely, that the Federal Trade Commission had fixed maximum prices and published same, at which coal and coke should be sold by producers and dealers generally. It is left for inference that the Federal Trade Commission did publish such maximum prices and that the defendant knew or should have known of the fixing of same.

Averments must be made positively and not by intendment or argument.

In Drake vs. State, 19 Oh. St. 211, is was said:

> "An intent to prejudice, damage, or defraud is an essential ingredient in the crime of forgery; and an indictment for that crime must, therefore, charge such intent directly and specifically; and a mere statement of such intent, in the conclusion of the indictment, by way of legal deduction or inference from the facts previously found is insufficient."

See also Fouts vs. the State, 8 Oh. St. 98. To the same effect is U. S. vs. Cruikshank, 82 U. S. 542, supra.

In United States vs. Carll, 105 U. S. 611, defendant was charged with feloniously and with intent to defraud, passing, uttering and publishing a falsely made, forged, counterfeited and altered obligation of the United States. In the course of his opinion, at page 612, Mr. Justice Gray said:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the

statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on like matters, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In Pettibone vs. United States, 148 U. S. 197, where defendant was charged with endeavoring to influence, intimidate, or impede an officer in a court of the United States in the discharge of his duty, by threats or force, the court said:

"An indictment against a person for corruptly or by threats of force, endeavoring to influence, intimidate, or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such.

A person is not sufficiently charged in such case with obstructing or impeding the due administration of justice in a court, unless it appear that he knew or had notice that justice was being administered in such court."

See also DuBrul vs. State, 80 Oh. St. 52.
Dillingham vs. State, 5 Oh. St. 280.
Lane vs. State, 39 Oh. St. 312.
Redmond vs. State, 35 Oh. St. 81.
United States vs. Burns, 54 Fed. 351.
Hague vs. United States, 154 Fed. 245.
Rosen vs. United States, 161 U. S. 29.
United States vs. Hess, supra.

The indictment, as has been shown, was based upon the alleged failure of defendant to obey a regulation prescribed by the President, under the power conferred on him by paragraph 1 of Section 25 of the Act, and the penalty imposed was that provided for in paragraph 17 of Section 25. The regulation, quoted in full at page —, supra, was:

> "For the buying and selling of bituminous coal a jobber shall not add to his purchase price a **gross margin** in excess of 15c per ton of 2,000 lbs.," etc. (Black face type ours.)

The indictment charged (second count, R. 3) that defendant—

> "feloniously did ask, demand and receive from Fred R. Kluckhohn, doing business at Naperville, Illinois, for a certain quantity of bituminous coal, to wit, about 49.85 tons of 2,000 lbs. each of Pocahontas run-of-mine coal, a price of three dollars and fifty ($3.50) cents per ton, f. o. b. at the mines producing said coal, which said price of three dollars and fifty ($3.50) cents per ton included a **profit or gross margin to it**, said The Matthew Addy Company, as such coal jobber, as aforesaid, of twenty-five (25) cents per ton, and which said **profit** or **margin** of twenty-five (25) cents per ton was and was well known by said The Matthew Addy Company, to be in excess of the **profit** or **gross** margin of 15 cents per ton of 2,000 lbs. permitted by the law, executive order and regulations above referred to, to be added to the purchase price of said jobber," etc. (Black face type ours.)

At the trial the Government, after first stating that it proposed to prove that the 25c a ton commission was a **profit** of 25c, was permitted by the court to abandon, and

did abandon any pretense of proving that the 25c a ton commission, or any part thereof, was profit (R. 30, 31). Defendant, by special charge No. 6 (R. 61), which was refused, asked the court to instruct the jury as follows:

> "The indictment charges in each count that the price of $3.50 per ton demanded and received by the defendant The Matthew Addy Company, included a profit or gross margin of 25 cents per ton, which was in excess of the profit or gross margin of 15 cents per ton fixed by said order of August 23, 1917. Profit, in these indictments, means the amount or sum remaining after the deduction of all cost and expense; and I charge you, that unless you find, beyond a reasonable doubt, that said sum of 25 cents per ton added by defendant The Matthew Addy Company to its purchase price of $3.25 per ton, included a profit, as above defined, in excess of 15 cents per ton, you shall find defendants and each of them not guilty."

The court charged the jury, at R. 64, as follows:

> "I charge you that 'profit' as there used, means the same as gross margin, that is, the difference between the purchase price and the selling price," etc.

At the close of the charge (R. 67) defendant's counsel stated:

> "We would like to reserve an exception to that part of the charge in which the court defined 'profit' as being equivalent to gross margin, and also a general exception to the charge."

In the assignments of error (6 on R. 70) the exception was preserved. The objection on the ground of indefiniteness had already been raised and overruled by the

motion to quash, and was also preserved by the ninth assignment of error (R. 70).

"Profit" does not, as matter of law, or according to its ordinary English significance, mean the same as "gross margin." On the contrary, gross margin means the total amount received by the jobber from his customer, over and above his, that is the jobbers' purchase price; whereas his **profit** is the gross margin **less his** expense. This is clearly recognized in the statute; see clause 15 of Section 25 where it is provided:

> "In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."

In Rubber Company vs. Goodyear, 9 Wall., 788, it is stated:

> "Profits . . . within the meaning of the law, are to be computed and arrived at by finding the difference between the cost and yield. In estimating the cost, the elements or price of materials, interest, expenses of manufacture and sale, and other necessary expenditures, if there be any, and paid debts, are to be taken into account . . . 'Profit' is the gain made upon any business or investment, when both the receipts and payments are taken into account."

In Curry vs. Charles Warner Company (Del.) 42 Atl. 425, 428, it is stated:

> "The word 'profit' is one in common use, unambiguous, and primarily means acquisition beyond expenditure, or the excess of sale or value received over cost. Has it any other or peculiar meaning in this contract? If not, the word is to be construed in its plain, ordinary and familiar sense."

The words "profit" and "gross margin," not being identical, the error of the court in stating that they were, must be presumed to be prejudicial to the defendant. The Lever Law was commonly known as a law against "profiteering," which, as the court knows, was a subject of much discussion and considerable public indignation at the time of the trial. The Government was permitted to allege that the 25c per ton added by defendant to its purchase price was "profit," but was relieved of the necessity of proving that any part of it was profit.

On the other hand, defendant was not permitted to show the contrary, and the jury may therefore have very well supposed that the entire "gross margin" was "profit," and accordingly placed defendant in the much despised class of "profiteers."

IV.

THE COURT ERRED IN OVERRULING THE DEMURRER OF DEFENDANT TO THE INDICTMENT, WHICH ATTACKED THE CONSTITUTIONALITY OF THE ACT OF CONGRESS OF AUGUST 10, 1917, COMMONLY KNOWN AS THE "NATIONAL DEFENSE (LEVER) ACT" (40 STAT. 278; COMP. ST. 1918, SEC. 3115⅛q) AND THE EXECUTIVE ORDER OF THE PRESIDENT, DATED AUGUST 23, 1917.

(a) The Act of Congress and the Rules, Regulations, Promulgations and Publications of the President and the United States Fuel Administrator Violate the Fifth Amendment to the Constitution of the United States, in that Defendant is Deprived of its Property Without Due Process of Law.

The first clause of Section 25 of the act, gives the President authority to fix the price of coal and coke. The eleventh clause provides that when directed by the President, the Federal Trade Commission is required to inquire as to the cost of production of coal and coke. The thirteenth clause provides that if the President has decided to fix prices and the Federal Trade Commission has completed its inquiry, **the Federal Trade Commission shall fix and publish maximum prices, which prices shall be observed by all producers and dealers.** (Black face type ours.)

Then in the fourteenth and fifteenth clauses, it is provided how maximum prices shall be arrived at. The seventeenth clause prescribed the penalty for not complying with the prices as fixed.

There is nothing in the act of Congress or in the regulations of the President thereunder, as they were construed and applied by the District Court, which provide for a hearing with regard to the fixing of prices. There is not even any semblance of a hearing either before the President or the Federal Trade Commission or a court. The President by himself or through the Federal Trade Commission may arrive at a price to be fixed, no matter how arbitrary or unreasonable, and every one within the meaning of the act must comply therewith. This is a taking of one's property or services without compensation and is purely confiscatory and within the prohibition of the amendment to the Federal Constitution. Assuming that the President has power to act without action by the Federal Trade Commission, there is nothing in the act of Congress which provides for the machinery to arrive at the cost of production. It is true the President may, if he sees fit, exercise his power through the agency of the Federal Trade Commission and the Federal Trade Commission may make inquiry as to the cost of production, but how they shall arrive at such cost of production, is not stated except that the act in clauses fourteen, fifteen and sixteen of Section 25 provides, "that in fixing maximum prices for producers, the commission shall allow the costs of production, including the expense of operation, maintenance, depreciation and

depletion and shall add thereto a just and reasonable profit."

> "That in fixing such prices for dealers, the commission shall allow the costs to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction."
>
> "That the maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith prior to the establishment and publication of maximum prices by the commission."

In the motion to quash the indictment (R. 20), which was overruled by the court, we contended that the word "may" as used in the first paragraph of Section 25 of the act of Congress in question should be read as "shall." That it was obligatory upon the President in all cases to exercise the authority therein vested in him, through the agency of the Federal Trade Commission.

The court below construed the phrase mentioned as being permissive on the part of the President, to exercise his authority through the agency of the Federal Trade Commission.

If the court's ruling on the motion to quash the indictment is correct, and as the act of Congress in question nowhere provides for an investigation by the President nor for any semblance of a hearing before him, the act of Congress in question is clearly invalid, as depriving defendant of its property without due process of law, and besides, the fact remains that the President has not exercised his authority through the Federal Trade Commission, which might have the machinery to provide for a hearing.

While the President is given the power to exercise his authority through the Federal Trade Commission, it is very apparent from his rulings and regulations, beginning with the first one under date of August 21, 1917, that he has not seen fit to use the agency of the Federal Trade Commission and that he has arbitrarily arrived at the maximum prices which he fixed in exercising that authority himself.

Nowhere in the act of Congress nor in any of the rulings and orders of the President, or the United States Fuel Administrator, is there a remedy provided for defendant, in the event that the prices as fixed were found not to include the cost of doing business, together with a fair profit, which the Federal Trade Commission is enjoined to allow dealers, when it (the Federal Trade Commission) investigates the cost of doing business and publishes maximum prices after the President has decided to fix prices of coal and coke.

Unlike the provision made in the act of Congress, for producers, who, in the event that their properties and output are commandeered by the President, may sue the United States, the defendant as a jobber, is entirely without remedy and if it exercises the privilege of charging a price which covers the cost of doing business, plus a fair profit, as the law intended for it to have, it is amenable to criminal proceedings, which impose a very heavy penalty.

If the law authorizes the President, by mere executive order without previous investigation to finally fix the jobber's compensation for his services without provision

for appeal, and does not permit the defendant to show upon the trial that the compensation so fixed is unfair and inadequate, the law is unconstitutional. Due process of law, as granted by the constitution, is not dependent upon the form of procedure, but there must be provided some fair method, either in advance or afterwards, for compensating the person whose property is taken, or whose service is compelled, for public or private uses.

It may be that where, upon investigation and hearing, a jobber's commission had been fixed for the trade in general, a particular jobber could not complain because of the fact that by reason of circumstances peculiar to him, the commission so fixed did not afford him adequate compensation. (See remarks of the district judge, R. 57.) But in this case there was no hearing or investigation prior to the order fixing the jobber's commission nor a pretense of any. The arbitrary jobber's commission embodied in the order of August 23rd, became effective thirteen days after the passage of the law itself. On September 6th, 1917, the United States Fuel Administrator, referring to the prices and commissions theretofore fixed, frankly stated that they had been fixed without investigation. He said: "The prices fixed are provisional. They will stand unless changed by order of the President for good cause shown. The Fuel Administration will examine all applications for revision of prices, accompanied by cost statements presented in writing." (See General Orders, Regulations and Rulings of the United States Fuel Administrator, p. .....; Appendix, p. .....) In fact they were afterwards changed several times and in many particulars.

The fixing of rates, charges or compensation for property taken, is certainly not an executive function. Where compensation for property taken is fixed by judgment of a court, it is always after hearing and investigation; where rates and charges are fixed by the legislature it is at least always presumed that investigation has been made.

If the President or other executive officer may exercise such power without investigation as was done in the present case, at least it must be open to the individual to show upon the trial that the enforcement of the order was confiscatory or non-compensatory as to him. This right was denied the defendant in this case.

What is "due process of law," has never been clearly defined by this court, except that it varies with the circumstances in each case.

A very good definition of "due process of law," as the term has been construed by this court and other courts of high standing, is that given by the Supreme Court of Iowa in the case of Smith vs. State Board of Medical Examiners, 117 N. W., 1116, in which case Smith's license to practice medicine was revoked. The court said:

> "The essential elements of 'due process of law' are notice and opportunity to defend; but 'due process' does not require that any particular form of proceedings be observed, but only that the same shall be regular proceedings, in which notice is given of the claim asserted, and an opportunity afforded to defend against it."

In the case of Postal Telegraph Cable Company vs. Newport, 247 U. S., 464, this court at page 476 said:

> "The opportunity to be heard is an essential requisite of due process of law in judicial proceedings" (citing cases).

In Ohio Valley Water Company vs. Ben Avon Borough et al., 253 U. S. 287, this court held:

> "An order of a commission fixing the maximum future rates chargeable by a water company violates due process of law if no fair opportunity is provided by the state law for submitting the question whether the rates are confiscatory to the determination of a judicial tribunal upon its own independent judgment as to both law and fact."

At page 289 of the opinion, it was said:

> "The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. (Citing cases.) In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. (Citing cases.)"

In American Surety Company of New York vs. Shallenberger, 183 Fed., 636 (C. C. Neb.), it was held:

> "Act Nebraska, April 1, 1909, (Laws 1909, c. 27), which makes it the duty of certain state offices to fix maximum rates of premium to be charged by all surety companies doing business in the state, foreign or domestic, for furnishing bonds, contracts, recognizances, stipulations and undertakings, makes it a misdemeanor for any officer or agent of any com-

pany to charge a higher rate and requires the revocation of the authority of the offending party to do business in the state, is void as depriving such companies of their property without due process of law, in violation of the fourteenth constitutional amendment."

In Chicago, Milwaukee and St. Paul Railway vs. Minnesota, 134 U. S., 448, it was held that the Minnesota statute regulating the rates of charges for the transportation of property and which provided that the rates recommended and published shall be final and conclusive as to what are equal and reasonable charges, was unconstitutional in that it deprived the company of its property without due process of law and also deprived it of the equal protection of the laws.

The Minnesota statute in question provided in Section 9 (f) that the Railroad Commission created, might issue forms of notices and service thereof which shall conform as nearly as may be to those in use in the courts of the state and that any party may appear before the state commission and be heard in person or by attorney. While this court in reviewing the decision of the Supreme Court of Minnesota, adopted the construction given the Act by the State Supreme Court, which seemed to ignore Section 9 (f) of the Act, still to accept the limited construction given to the Act, which this court held to be unconstitutional, it appears that the construction given to that law, was more favorable and more in keeping with the statutory limitations, than the construction given by the courts below to Section 25 of the Act of Congress of August 10, 1917. And yet this court held that the Min-

nesota law was in conflict with the fourteenth amendment of the constitution of the United States. The case of Chicago, Milwaukee and St. Paul Railway Company vs. Minnesota was followed in Minneapolis Eastern Railway Company vs. Minnesota, 134 U. S., 467, and has been followed in innumerable cases in this court.

If the President of the United States had by virtue of the Act of Congress complained of, the right to fix prices of coal and coke, then we contend that under the Minnesota case decision, the Act of Congress giving him such authority is in conflict with the fifth amendment to the United States Constitution, in that it deprives defendant of its property, without due process of law.

In Stone vs. Farmers' Loan & Trust Company, which is known as the Railroad Commission case, 116 U. S., 307, at page 331, this court said:

> "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In Oklahoma Operating Company vs. Love, 252 U. S. 331, there was before the court a statute of the State of Oklahoma, creating a State Commission with power to determine what businesses are deemed to be public ones

and monopolies, and to limit their charges. The law and the constitution of the state prohibited any of its courts from reviewing any action of the Commission within its authority, except by way of appeal to the State Supreme Court, and the Supreme Court had construed the constitution and applicable statutes as not permitting a direct appeal from the order fixing rates. The State Commission declared a laundry to be monopely in its business public, and limiting its rates. No review was permitted direct by appeal, mandamus, prohibition or otherwise, in any court of the state, and the only recourse for securing a judicial test of the adequacy of the rates fixed was to disobey the order and to appeal to the State Supreme Court from further action of the Commission, when taken, imposing a penalty for contempt; a penalty as high as $500 might be imposed, and a new one for each violation of the order; and each day's refusal was declared to be a separate offense.

This court held:

> "Applying **Ex parte Young**, 209 U. S., 123, 147, and other cases, that the provisions relating to the enforcement of the rates by penalties were violative of the Fourteenth Amendment, without regard to the question of the insufficiency of the rates."

This court, speaking through Mr. Justice Brandeis, at page 335 of the opinion, said:

> "The order of the Commission prohibited from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribing maximum rates for the service. It was, therefore, a legislative order; and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review

in the courts of its contention that the rates were not compensatory." (Citing cases.)

In Holter Hardware Company v. Boyle, 263 Fed., 134 (D. C. Mont; appeal dismissed in 257 U. S., 666), Bourquin, D. J., in passing upon the constitutionality of a statute of Montana, which created a State Trade Commission, with power to regulate prices and profits, including those in ordinary mercantile business, reviews the authorities thoroughly and analyzes them carefully, both with reference to state statutes under the police power and federal statutes under the federal powers, and held that the Montana Act was unconstitutional and void as depriving persons affected, of their property without due process of law.

At page 135 of the opinion, the learned court says:

> "Emergency, opinion, morality, changes wrought by time and circumstances, often justify exercise of powers that legislatures have; but they create no new powers. It is true that the Constitution is not a barrier to changes in state policy and law to suit new circumstances and conditions, not a barrier to new application of its principles; but it does oppose all changes that would avoid or supplant its principles with other, however, calculated to suit the needs of the hour and the temper of the times. Its generic terms open always to include newly created species."

In the case of Adams vs. Tanner, 244 U. S., 590, this court held that a state statute prohibiting the charge of a consideration for securing honest work for the unemployed was violative of the Fourteenth Amendment of the Constitution, notwithstanding the business itself was

subject to regulation under the police power of the state.

To protect the private property of an individual from confiscation or unreasonable remuneration, as well as liberty to contract, this court has upon a number of occasions held invalid acts of congress and of the state legislatures, which attempted to test out social legislation that was in popular demand and requested of the legislative bodies by writers, students and private citizens from many parts of the country, such as the Federal Child Labor Laws, the Minimum Wage for Women Law, the Future Trading Act, the Kansas Industrial Court Law in Hammer v. Dagenhart, 247 U. S., 251; Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U. S., 20; Adkins et al. vs. Children's Hospital, 260 U. S., 43 Sup. Ct. Rep., 394; Hill et al. vs. Wallace, 259 U. S., 44; Wolff Packing Co. vs. Court of Industrial Relations, 261 U. S., ——, 43 Sup. Ct. Rep., 630.

In the present case, the District Court in his opinion in which he overruled the demurrer to the indictment (R. 22), said:

> "It is true that the Act afforded no opportunity for judicial review of the reasonableness of the prices fixed by the President, and this has been determined, under ordinary circumstances, with reference to railroad and other rates, to be want of due process of law. Chicago, Milwaukee & St. Paul Railway vs. Minnesota, 134 U. S., 418; Minnesota Rate Cases, 230 U. S., 352, 434; Oklahoma Operating Co. vs. Love, 252 U. S., 331; Holter Hardware Co. vs. Boyle, 263 Fed., 134."

But the judge stated:

> "Public danger warrants the substitution of executive process for judicial process. Moyer vs. Peabody, 212 U. S., 78."

The decision of the court in that case is no authority for sustaining the judgment here. It involved no question of the taking of property, but merely held that the declaration of the Governor of a State that a state of insurrection existed was conclusive, and that the Circuit Court had no jurisdiction to entertain a civil suit for damages against him by a person he had caused to be placed under arrest in time of disorder.

But emergency does not permit the substitution of any kind of process for "due process." In the case of Murray's Lessee vs. Hoboken Land Company, 18 How., 272, at page 276, this court said:

> "The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process that might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process, 'due process of law,' by its mere will."

Neither can this case be supported on authority of the so-called "emergency law" cases, such as Wilson vs. New, 243 U. S., 332; (Adamson Law); Block vs. Hirsch, 256 U. S., 135 (rent law); Marcus Brown Holding Company vs. Feldman, 256 U. S., 170 (rent law); Levy Leas-

ing Company vs. Siegel, 258 U. S., 242, 42 Sup. Ct. Rep., 289 (rent law).

In the foregoing so-called "emergency law" cases, just compensation or reasonable payment for the service was provided for by the laws themselves, and the only question with reference to the emergency was, whether Congress or the State Legislature was justified in such emergency to pass laws of such nature dealing with private property or contracts. Not one of these so-called "emergency laws" would have been upheld by this court, had not just compensation, to be determined in some manner or other ultimately by the courts, been provided for in the laws themselves.

In Wilson vs. New, supra, this court said:

> "In an emergency arising from a nation-wide dispute over wages between railroad companies and their train operatives, in which a general strike, commercial paralysis and grave loss and suffering overhang the country because the disputants are unable to agree, Congress has power to prescribe a standard of minimum wages, **not confiscatory in its effects** but obligatory on both parties, to be in force for a reasonable time, in order that the calamity may be averted and that opportunity may be afforded the contending parties to agree upon and substitute a standard of their own." (Black type ours.)

In Block vs. Hirsch, supra, this court, speaking through Mr. Justice Holmes, at page 157 of the opinion, said:

> "Machinery is provided to secure to the landlord a reasonable rent. Sec. 106."

Nor can this case be compared to, or justified under the authority of the Selective Draft Law cases, 245 U. S.

366; Jones vs. Perkins, 245 U. S. 390; Cox vs. Wood, 247 U. S. 3; which cases were supported under the authority of Congress to raise armies by reason of the war powers given to Congress by the Constitution.

The opinion of the District Court, approved by the Court of Appeals, in distinguishing between the right to have a judicial review or a hearing within the ordinary meaning of "due process of law" and the substitution of executive process for judicial process within the meaning of the case of Moyer vs. Peabody Company, supra, virtually means that the exigency of the late war in effect authorized the suspension of the limitations contained in the Fifth Amendment to the Constitution.

That the existence of a state of war does not suspend the constitutional limitations, had been decided by this court in Ex parte Milligan, 4 Wall. 2, and subsequently affirmed in Hamilton vs. Kentucky Distilleries, 251 U. S. 146; United States vs. Cohen Grocery Company, 255 U. S. 81. See also United States vs. New River Collieries Company, 260 U. S. (.....); 43 Sup. Ct. Rep. 565.

In this holding by the District Court and the Court of Appeals, we submit there was error. In the case of United States vs. Cohen Grocery Company, 255 U. S. 81, in which section 4 of the Lever Act was held unconstitutional, this court, speaking through Mr. Chief Justice White, at page 88 of the opinion said:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably established that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments

as to questions such as we are here passing upon (citing cases.) It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."

Testing the present case by the rule laid down in the Cohen case, it is very evident that the opinion of the District Court and the Court of Appeals in this case is not sound. While Sec. 25 of the Lever Act differs from that of Sec. 4, which was held unconstitutional in the Cohen case, in that by virtue of Sec. 25 prices were fixed, whereas in the Cohen case no prices were fixed, and notwithstanding the fact that in the Cohen case, Sec. 4 was held unconstitutional because the question of what were reasonable prices were too indefinite, and did not sufficiently inform the defendant of the charge against him, nevertheless the principle laid down by this court in the Cohen case, that the existence or non-existence of a state of war, or, to use the words of the District Judge and the Court of Appeals, "public danger," becomes negligible, and should be put out of view, and the usual rules with reference to the limitations of the Constitution upon the power of Congress and the Chief Executive should be applied. If, as is admitted by the District Court and the Court of Appeals, under ordinary circumstances there is a want of due process of law so far as this petitioner is concerned, then by applying the rule laid down by this court in the Cohen case, petitioner has been deprived of its property without due process of law, notwithstanding this proceeding grew out of and was during the existence

of a state of war, and was based upon an Act of Congress passed during such war.

The validity of Sec. 25 of the Lever Act was involved, but its validity not passed on by this court in Morrisdale Coal Co. vs. United States, 259 U. S. 188 and Pine Hill Coal Co. vs. United States, 259 U. S. 191.

In passing upon the question of "just compensation" under Sec. 10 of the Lever Act, this court did not limit the price required to be paid for coal taken by the Government or Government agencies, to the price fixed by the President or the Fuel Administration, but allowed the reasonable market value thereof, thereby in effect ignoring the validity of the price-fixing methods of the President or the Fuel Administration.

As said by the court in the United States vs. New River Collieries Company, 260 U. S. ——, 43 Sup. Ct. Rep. 565:

> "The owner of coal taken by the Government, under the Lever Act, Sec. 10, was entitled to the full money equivalent of the property taken, and to be put in as good position pecuniarily as it would have occupied, if its property had not been taken.
>
> The ascertainment of compensation for the property taken by the Government under Lever Act, Sec. 10, is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

See also the case of:

Vogelstein vs. United States, 260 U. S. ——, 43 Sup. Ct. Rep. 564.

Seaboard Air Line Railway vs. United States, 260 U. S. ——, 43 Sup. Ct. Rep. 354.

United States vs. Blake, 279 Fed. 71 (C. C. A. 6) and Blake vs. United States, 275 Fed. 861 (D. C.)

See also the case of Pharr and Sons vs. Kenny, 272 Fed. 37, (C. C. A. 5—writ of certiorari denied in 257 U. S. 648; 42 Sup. Ct. Rep. 57) which was a civil action between two parties on a contract for the sale and purchase of sugar, during the term of which the price was fixed by the United States Food Administration. That court in syl. 7, said:

> "The United States Food Administration, could not under the Act of Congress (Comp. St. 1918, Secs. 3115¼e;-3115¼kk;-3115¼e;-3115¼m) creating it, arbitrarily fix a price at which future sales of sugar should be made."

Our principal objection to the statute on constitutional grounds, as applied to the facts in this case, is not so much that the President was without power to fix the broker's commission; but that Congress was without power to authorize him to do so without investigation and without notice to the defendant and opportunity to be heard, and to subject the defendant to criminal punishment without permitting it at some time or other to show that the commission fixed was non-compensatory. In other words, we insist that property cannot be taken for public or private use or services compelled for such use, without the right to have it determined somewhere and at some time, either in advance or afterwards, whether the compensation provided is adequate.

As was said by the Ohio Supreme Court in Railroad Company vs. Keith, 67 Oh. S. 279, in syl. 3, in which the validity of an assessment on real estate was involved:

> "It is necessary to the validity of an assessment on real estate, other than general taxes, that some-

where along the line of proceedings, notice be given to the owner, and an opportunity afforded him to be heard in opposition or defense."

See also Brieholz vs. Board of Supervisors, 257 U. S. 118.

In connection with the danger of the encroachment by the legislative body upon individual liberty, we deem it not amiss to quote from Mr. Justice Bradley, speaking for this court in Boyd vs. United States, 116 U. S. 616, in which, at pages 635, he said:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be **obsta principiis.**"

(b) The Act of Congress Violates Section 1 of Article 1; Section 1 of Article 2 and Section 1 of Article 3, of the Constitution of the United States, in That it Delegates Legislative and Judicial Powers to the President of the United States, to the United States Fuel Administrator Appointed by the President, and the Federal Trade Commission.

The courts have uniformly held that rate fixing or price fixing is a legislative function. It has also been recognized that if the subject is one over which the state legislature or Congress has authority, it may regulate the use or even the charge for the use of private property.

This rule has been well established since the case of Munn vs. Illinois, 94 U. S. 113, in which an Illinois statute regulating the maximum charges for grain elevators was upheld.

In Interstate Commerce Commission vs. Cincinnati, New Orleans and Texas Pacific Railway Company, 167 U. S. 479, in which the court held that Congress had not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum or minimum or absolute, this court, at page 501 of the opinion, said:

> "Article 2, Section 3 of the Constitution of the United States ordains that the President shall take care that the laws be faithfully executed. The Act to regulate commerce is one of those laws, but it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce."

At page 505 of the opinion, the court said:

> "We have, therefore, these considerations presented: First, the power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function."

In City of Knoxville vs. Knoxville Water Company, 212 U. S. 1, it was said:

> "Rate making is a legislative function, whether exercised by the legislature or by a subordinate or administrative body to which power has been delegated, such as a municipality."

In the Minnesota Rate Cases, 230 U. S. 352, it was said:

> "The rate making power is a legislative power and necessarily implies a range of legislative discretion."

That rate fixing or price fixing is a legislative function cannot at this time, in the face of the numerous decisions, be contradicted.

In Field vs. Clark; Boyd vs. United States, and Sternback vs. United States, reported in 143 U. S. 649, it was held.

> "Congress cannot, under the Constitution, delegate its legislative power to the President."

At page 692 of the opinion, it was said:

> "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

At page 693 of the opinion, the court quotes with approval, from the opinion of Judge Ranney of the Supreme

Court of Ohio, in the case of Cincinnati, Wilmington, etc., Railroad vs. Commissioners, 1 Oh. St. 88, as follows:

> "The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what is shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; and to the latter no valid objection can be made."

In the same case the court said:

> "Power of the general assembly to pass laws cannot be delegated by them to any other body, or to the people."

See also:

Buttfield vs. Stranahan, 192 U. S. 470.
United States vs. Grimaud, 220 U. S. 507.
Light vs. United States, 220 U. S. 523.

Applying the rules just stated as are deduced from the cases cited, to Section 25 of the Act of Congress of August 10, 1917, let us see what is the result. Clause 1 of Section 25 of the Act, which is in question before the court, provides as follows:

> "That the President of the United States shall be and he is hereby authorized and empowered whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the mode of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic and foreign."

This gives the President of the United States the authority to fix the prices of ordinary commodities such as coal and coke. Without going into the question as to whether it is within the power of Congress to regulate prices within the meaning of the case of Munn vs. Illinois, supra, we contend that the President has no such authority and cannot be given such authority by Congress, and the exercise of such a power by the President, whether of his own whim, or under color of law, as enacted by Congress, is clearly in violation of the United States Constitution in which the respective powers of the three departments of the government are enumerated, namely the executive, the legislative and the judicial.

In Clause 2 of Section 25 of the Lever Act, the President is authorized, "If, in his opinion, any such producer or dealer fails or neglects to conform to such prices or regulations or to conduct his business efficiently under the regulations and control of the President as aforesaid; or conducts it in a manner prejudicial to the public interests, to requisition and take over the plant, business and all the appurtenances thereof belonging to such producer or dealer."

In Clause 17 of Section 25, it is made an offense punishable by a fine and imprisonment for anyone, "with knowledge that the prices of coal and coke have been fixed, to ask demand or receive a higher price." The result of reading the penal section of the Act in connection with the authority granted the President, is that prices fixed by the President as a result of his exercising undelegated legislative powers are to have the effect of law, which,

if violated, will subject the violator to severe punishment of a fine of not more than $5,000.00 or imprisonment for not more than two years.

That the President has exercised this undelegated power appears from the various rules and regulations promulgated by the President through the United States Fuel Administration. In publication No. 2 of the United States Fuel Administration, published August 21, 1917, the President fixed the price of bituminous coal throughout various states in the union. (See appendix p. 80.) On August 23, 1917, in publication No. 3, the President fixed the price of anthracite coal and the commissions of jobbers for buying and selling bituminous coal. (See appendix p. 83.) Likewise for about a year the President issued proclamations and regulations, not only regulating the prices but also the production, distribution and consumption of coal and coke.

In publication No. 9, issued by the United States Fuel Administrator on October 6, 1917, it was provided in paragraphs 8 and 9, as follows:

> "A jobber who had already contracted to buy coal at the time of the President's order fixing the price of such coal, and who was at that time already under contract to sell the same, may fill his contract to sell at the price named therein.
>
> "A jobber, who at the time of the President's order fixing the price of the coal in question at the mine, had contracted to buy coal at or below the President's price, **and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission** as determined by the President's regulation of August 23, 1917." (Black face type ours.) (See general orders, regulations and rulings of the United States Fuel Administrator p. ——; appendix p. 84.)

It is manifest from the foregoing, that the President attempted to exercise judicial powers, by interpreting the meaning of the clause, "the maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission," as used in the Act of Congress complained of.

No clearer example of the exercise of undelegated powers by the chief executive can be found.

It is the sole duty of the courts to pass upon the question of the reasonableness of the rates or prices that may be fixed by the legislature or administrative bodies which have power to fix such rates or prices, such as the Interstate Commerce Commission.

In Monongahela Navigation Company vs. United States, 148 U. S., 312, at page 327, this court, speaking through Mr. Justice Brewer, said:

> "By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

In Seaboard Air Line Railway Company vs. United States, supra, this court said:

> "Lever Act, August 10, 1917, Sec. 10 (Comp. St. 1918, Sec. 3115¼-i) authorizing the President to requisition property needed for war purposes, and to pay a just compensation therefor, without specifying any allowance of interest, requires payment of just compensation guaranteed by the Constitution, the right to which cannot be taken away, **and the ascertainment of which is a judicial function.**" (Black face type ours.)

And the same rule was approved by this court in United States vs. New River Collieries Company, 260 U. S. ....., 43 Sup. Ct. Rep., 565, at 567, in which this court, speaking through Mr. Justice Butler, said:

> "The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation is to be, or to prescribe any binding rule in that regard."

(c) The Act of Congress Violates Clause 1 of Section 8 of Article 1, and Clause 2 of Section 8 of Article 1, of the Constitution of the United States, in that, it is an Abuse of the Power Given to Congress to Provide for the National Security and Defense.

Congress has, under the constitution, express delegated war powers (Art. 1, Sec. 8, Cl. 11, U. S. Constitution). While it is conceded that the war powers of Congress must not be necessarily restricted, yet even these powers, broad as they are, must be subjected to proper constitutional limitations. Similarly the exercise of the police

power, by the state, or through Congress, must be subjected to constitutional limitations. As was said by this court in Hamilton vs. Kentucky Distilleries, supra:

> "The war powers of the United States, like its other powers, and like the police power of the states, is subject to applicable constitutional limitations."

The emergency does not enlarge the powers of Congress, but merely justifies the exercise of powers which Congress has, but which are latent.

In Ex parte Milligan, supra, this court said:

> "Neither the President nor Congress, nor the judiciary can disturb any one of the safeguards of civil liberty incorporated into the constitution, except so far as the right is given to suspend in certain cases the privileges of the writ of habeas corpus."

In his dissenting opinion in the case of Ruppert vs. Caffey, 251 U. S., 261, Mr. Justice McReynolds, quite appropriately said:

> "For sixty years, Ex Parte Milligan, 4 Wall., 2, 120, has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights."

At probably no other time in the history of the American republic, have the American institutions been put to a greater test than during the recent war. At no time in the history of the republic, have the courts been more anxiously called upon, to protect the individual from

the deprivation of his civil rights and liberties, guaranteed by the Constitution, and the courts should not hesitate to protect the individual from the arbitrary powers of the chief executive, or the legislative branch of the government, exerted during the then impending conflict, involving as it did, the very existence of the government itself.

As was said by the court in Norris vs. Doniphan, 61 Ky., 385, at page 396:

> "The constitution was designed to be perpetual, and neither the President nor the Congress has the power to suspend it in war any more than in peace."

At page 401, the court further said:

> "The constitution does not recognize military necessity nor any other necessity whatever, as an authority for taking private property for public uses in peace or in war, without just compensation."

There is sufficient precedent for the court to declare an act of Congress passed under its war power unconstitutional, when such a law exceeds its constitutional limitations.

In ex parte Field, Federal Case No. 4761, the Circuit Court of the United States for the district of Vermont held two orders of the war department issued by direction of President Lincoln, under his proclamation of August 8, 1862, to be invalid as in violation of Section 9 of Article 1 and of Articles 4 and 5 of the amendments to the Constitution.

In Hodgson vs. Millward, 3 Grant's Cases (Pa.), 405, it was held:

> "The act of Congress of August 6, 1861, requiring the President, in certain cases, 'to cause certain property to be seized, confiscated and condemned,' does not authorize it to be done except by due process of law."

See also Griffin vs. Wilcox, 21 Ind., 370.

An emergency does not justify the violation of the plain provisions of the Constitution.

In United States vs. Lombardo, 241 U. S., 74, it was held:

> "The proper and reasonable construction of a criminal statute must not be refused for fear of delay in prosecution of offenders; if the statute as so construed might embarrass prosecutions, it may be corrected by legislation."

Assuming for the sake of argument that there is some reasonable or substantial connection between the regulation of the production of coal and coke to the conducting of the war or to the promotion of the national defense, in that coal and coke are commodities that are essential to the carrying on of the war, still it can hardly be argued that the power to regulate the production of coal begets the power to regulate the prices thereof. The price fixing of coal and coke is entirely independent of the production. As was said by the court in the case of Wilson vs. New, supra, in construing the Adamson Eight Hour Law:

> "The power to establish an eight-hour day does not beget the power to fix wages."

(d) The Act of Congress Violates the Tenth Amendment to the Constitution of the United States in that it Interferes with the Rights of the Respective States, as to Regulation of Industries Within the States.

The Tenth Amendment to the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

If no power vested in Congress to regulate the prices of coal and coke, then as a matter of course the only body that could, under any guise, exercise such power, would be the state legislature in the exercise of the police power of the state.

In the case of Hammer vs. Dagenhart, 247 U. S., 251, this court held the Federal Child Labor Law unconstitutional as not being within the powers of Congress nor within its authority to regulate interstate commerce. No one would, for a minute, question the salutary policy of correcting the evil of child labor. Social justice demands it and while it is very evident that certain states of the Union would not enforce local laws prohibiting child labor and that in the absence of a federal law on the subject there would be no means of correcting the evil, yet this court held that it was beyond the powers of Congress to enact such a law.

The child labor law had a much more reasonable and substantial relation to the regulation of interstate commerce than the Lever Act had with the carrying on of the war and the promotion of the national defense; and likewise the child labor law was a matter of greater economic necessity than the Lever Act, yet the child labor law was held unconstitutional, as being a power reserved to the states.

As was said in the Hammer case:

> "The power to regulate interstate commerce was not intended as a means of enabling Congress to equalize the economic conditions in the states for the prevention of unfair competition among them, by forbidding the interstate transportation of goods made under conditions which Congress deems productive of unfairness.
>
> It was not intended as an authority of Congress to control the states in the exercise of their police power over local trade and manufacture, always existing and expressly reserved to them by the tenth amendment."

See also:

Bailey v. Drexel Furniture Co. (Child Labor Tax Law), 259 U. S., 20, and
Hill et al. vs. Wallace (Future Trading Act), 259 U. S., 44.

How much more can it be said of the Lever Act that the conducting of the war and the promotion of the national defense was not intended as an opportunity to test economic and political theories.

CONCLUSION.

We respectfully submit that the judgments of the courts below should be reversed and the case remanded with instructions to dismiss the indictment, or in the alternative that a new trial be granted.

NELSON B. CRAMER,
JULIUS R. SAMUELS,
Attorneys for Petitioner.

APPENDIX.

Act of Congress of August 10, 1917, commonly known as National Defense (Lever) Act (40 Stat. 276).

Section 1.—Food and Fuel Control Act.

An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel, including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and

prescribed. The President is authorized to make such regulations and to issue such orders as are essential effectively to carry out the provisions of this act.

Sec. 2. That in carrying out the purposes of this act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or person, to utilize any department or agency of the Government and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds.

* * * * * * * * * * *

Sec. 4. That it is hereby made unlawful for any person willfully to destroy any necessaries for the purpose of enhancing the price or restricting the supply thereof; knowingly to commit waste or willfully to permit preventable deterioration of any necessaries in or in connection with their production, manufacture, or distribution; to hoard, as defined in section six of this Act, any necessaries; to monopolize or attempt to monopolize, either locally or generally, any necessaries; to engage in any discriminatory and unfair, or any deceptive or wasteful practice or device, or to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person, (a) to limit the facilities for transporting, producing, harvesting, manufacturing, supplying, storing, or dealing in any necessaries; (b) to restrict the supply of any necessaries; (c) to restrict distribution of any necessaries; (d) to prevent,

limit, or lessen the manufacture or production of any necessaries in order to enhance the price thereof, or (e) to exact excessive prices for any necessaries; or to aid or abet the doing of any act made unlawful by this section.

* * * * * * * * * * *

Sec. 6. That any person who willfully hoards any necessaries shall upon conviction thereof be fined not exceeding $5,000 or be imprisoned for not more than two years, or both. Necessaries shall be deemed to be hoarded within the meaning of this Act when either (a) held, contracted for, or arranged for by any person in a quantity in excess of his reasonable requirements for use or consumption by himself and dependents for a reasonable time; (b) held, contracted for, or arranged for by any manufacturer, wholesaler, retailer, or other dealer in a quantity in excess of the reasonable requirements of his business for use or sale by him for a reasonable time, or reasonably required to furnish necessaries produced in surplus quantities seasonally throughout the period of scant or no production; or (c) withhold, whether by possession or under any contract or arrangement, from the market by any person for the purpose of unreasonably increasing or diminishing the price: Provided, That this section shall not include or relate to transactions on any exchange, board of trade, or similar institution or place of business as described in section thirteen of this act that may be permitted by the President under the authority conferred upon him by said section thirteen: Provided, however, That any accumulating or withholding by any farmer or gardener, cooperative association or

farmers or gardeners, including live-stock farmers, or any other person, of the products of any farm, garden, or other land owned, leased, or cultivated by him shall not be deemed to be hoarding within the meaning of this Act.

* * * * * * * * * * *

Sec. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum as will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies: Provided, That nothing in this section or in the section that follows, shall be construed to require any natural person to furnish to the Government any necessaries held by him and reasonably required for consumption or use by himself and dependents, nor shall any person, firm, corporation, or association be required to furnish to the Government any seed necessary for the seeding of land owned, leased, or cultivated by them.

Sec. 25. (1) That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary.

(2) That if, in the opinion of the President, any such producer or dealer fails or neglects to conform to such prices or regulations, or to conduct his business efficiently under the regulations and control of the President as aforesaid, or conducts it in a manner prejudicial to the public interest, then the President is hereby authorized and empowered in every such case to requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealer as a going concern, and to operate or cause the same to be operated in such manner and through such agency as he may direct during the period of the war or for such part of said time as in his judgment may be necessary.

(3) That any producer or dealer whose plant, business, and appurtenances shall have been requisitioned or taken over by the President shall be paid a just compensation for the use thereof during the period that the same may

be requisitioned or taken over as aforesaid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission.

(4) That if the prices so fixed, or if, in the case of the taking over or requisitioning of the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

(5) While operating or causing to be operated any such plants or business, the President is authorized to prescribe such regulations as he may deem essential for the employment, control, and compensation of the employees necessary to conduct the same.

(6) Or if the President of the United States shall be of the opinion that he can thereby better provide for the common defense, and whenever, in his judgment, it shall be necessary for the efficient prosecution of the war, then he is hereby authorized and empowered to require any or all producers of coal and coke, either in any special area or in any special coal fields, or in the entire United States, to sell their products only to the United States through an agency to be designated by the President, such agency to regulate the resale of such coal and

coke, and the prices thereof, and to establish rules for the regulation of and to regulate the methods of production, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign, and to make payment of the purchase price thereof to the producers thereof, or to the person or persons legally entitled to said payment.

(7) That within fifteen days after notice from the agency so designated to any producer of coal and coke that his, or its, output is to be so purchased by the United States as hereinbefore described, such producer shall cease shipments of said product upon his own account and shall transmit to such agency all orders received and unfilled or partially unfilled, showing the exact extent to which shipments have been made thereon, and thereafter all shipments shall be made only on authority of the agency designated by the President, and thereafter no such producer shall sell any of said products except to the United States through such agency, and the said agency alone is hereby authorized and empowered to purchase during the continuance of the requirement the output of such producers.

(8) That the prices to be paid for such products so purchased shall be based upon a fair and just profit over and above the cost of production, including proper maintenance and depletion charges, the reasonableness of such profits and costs of production to be determined by the Federal Trade Commission, and if the prices fixed by the said commission of any such product purchased by the United States as hereinbefore described be unsatis-

factory to the person or persons entitled to the same, such person or persons shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

(9) All such products so sold to the United States shall be sold by the United States at such uniform prices, quality considered, as may be practicable and as may be determined by said agency to be just and fair.

(10) Any moneys received by the United States for the sale of any such coal and coke may, in the discretion of the President, be used as a revolving fund for further carrying out of the purposes of this section. Any moneys not so used shall be covered into the treasury as miscellaneous receipts.

(11) That when directed by the President, the Federal Trade Commission is hereby required to proceed to make full inquiry, giving such notice as it may deem practicable, into the cost of producing under reasonably efficient management at the various places of production the following commodities, to wit, coal and coke.

(12) The books, correspondence, records, and papers in any way referring to transactions of any kind relating to the mining, production, sale, or distribution of all mine operators or other persons whose coal and coke have or may become subject to this section, and the books, correspondence, records, and papers of any person applying

for the purchase of coal and coke from the United States shall at all times be subject to inspection by the said agency, and such persons or persons shall promptly furnish said agency any data or information relating to the business of such person or persons which said agency may call for, and said agency is hereby authorized to procure the information in reference to the business of such coal-mine operators and producers of coke and customers therefor in the manner provided for in sections six and nine of the act of Congress approved September twenty-sixth, nineteen hundred and fourteen, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and said agency is hereby authorized and empowered to exercise all the powers granted to the Federal Trade Commission by said act for the carrying out of the purposes of this section.

(13) Having completed its inquiry respecting any commodity in any locality, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

(14) In fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation, and depletion, and shall add thereto a just and reasonable profit.

(15) In fixing such prices for dealers, the commission

shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

(16) The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission.

(17) Whoever shall, with knowledge that the prices of any such commodity have been fixed as herein provided, ask, demand, or receive a higher price, or whoever shall, with knowledge that the regulations have been prescribed as herein provided, violate or refuse to conform to any of the same, shall, upon conviction, be punished by fine of not more than $5,000, or by imprisonment for not more than two years, or both. Each independent transaction shall constitute a separate offense.

(18) Nothing in this section shall be construed as restricting or modifying in any manner the right the Government of the United States may have in its own behalf or in behalf of any other Government at war with Germany to purchase, requisition, or take over any such commodities for the equipment, maintenance, or support of armed forces at any price or upon any terms that may be agreed upon or otherwise lawfully determined.

Orders and Regulations of the President and the United States Fuel Administration Relating to the Price of Coal.

President's Order of August 21, 1917.

Executive Order of the President of August 21, 1917, Effective Evening of August 21, 1917, Fixing Provisional Prices for Bituminous Coal at the Mine, Issued as Publication No. 2 of the United States Fuel Administration.

The White House,
Washington, 21 August, 1917.

The following scale of prices is prescribed for bituminous coal at the mine in the several coal-producing districts. It is provisional only. It is subject to reconsideration when the whole method of administering the fuel supplies of the country, shall have been satisfactorily organized and put into operation. Subsequent measures will have as their object a fair and equitable control of the distribution of the supply and of the prices not only at the mines but also in the hands of the middlemen and the retailers.

The prices provisionally fixed here are fixed by my authority under the provisions of the recent act of Congress regarding administration of the food supply of the country which also conferred upon the Executive control of the fuel supply. They are based upon the actual cost of production and are deemed to be not only fair and just but liberal as well. Under them the industry should nowhere lack stimulation.

Woodrow Wilson.

	Run of mine	Prepared sizes	Slack or screenings
Pennsylvania	$2.00	$2.25	$1.75
Maryland	2.00	2.25	1.75
West Virginia	2.00	2.25	1.75
West Virginia (New River)	2.15	2.40	1.90
Virginia	2.00	2.25	1.75
Ohio (thick vein)	2.00	2.25	1.75
Ohio (thin vein)	2.35	2.60	2.10
Kentucky	1.95	2.20	1.70
Kentucky (Jellico)	2.40	2.65	2.15
Alabama (big seam)	1.90	2.15	1.65
Alabama (Pratt, Jaeger, Corona)	2.15	2.40	1.90
Alabama (Cahaba & Black Creek)	2.40	2.65	2.15
Tennessee (eastern)	2.30	2.55	2.05
Tennessee (Jellico)	2.40	2.65	2.15
Indiana	1.95	2.20	1.70
Illinois	1.95	2.20	1.70
Illinois (third vein)	2.40	2.65	2.15
Arkansas	2.65	2.90	2.40
Iowa	2.70	2.95	2.45
Kansas	2.55	2.80	2.30
Missouri	2.70	2.95	2.45
Oklahoma	3.05	3.30	2.80
Texas	2.65	2.90	2.40
Colorado	2.45	2.70	2.20
Montana	2.70	2.95	2.45
New Mexico	2.40	2.65	2.15
Wyoming	2.50	2.75	2.25
Utah	2.60	2.85	2.35
Washington	3.25	3.50	3.00

Note. Prices are on f. o. b. mine basis for ton of 2000 lbs.

Appointment of U. S. Fuel Administrator, Aug. 23, 1917.

Executive Order of the President of the United States, Dated August 23, 1917, Issued as Publication No. 1 of the United States Fuel Administration, Appointing H. A. Garfield, United States Fuel Administrator.

By virtue of the power conferred upon me under the act of Congress approved August 10, 1917, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and particularly for the purpose of carrying into effect the provisions of said act relating to fuel, Harry A. Garfield is hereby designated and appointed United States Fuel Administrator to hold office during the pleasure of the President.

Said Fuel Administrator shall supervise, direct, and carry into effect the provisions of said act and the powers and authority therein given to the President so far as the same apply to fuel as set forth in said act, and to any and all practices, procedure, and regulations authorized under the provisions of said act applicable to fuel, including the issuance, regulation, and revocation under the name of said United States Fuel Administrator of licenses under said act. In this behalf he shall do and perform such acts and things as may be authorized and required of him from time to time by direction of the President and under such rules and regulations as may be prescribed.

Said Fuel Administrator shall also have the authority to employ such assistants and subordinates, including such counsel as may from time to time be deemed by him necessary, and to fix the compensation of such assistants, subordinates, and counsel.

All departments and established agencies of the Government are hereby directed to cooperate with the United States Fuel Administrator in the performance of his duties as hereinbefore set forth.

Woodrow Wilson.

The White House, 23 August, 1917.

Orders Relating to Jobbers, August 23, 1917.

Executive Order of the President of the United States of August 23, 1917, Issued as Paragraphs 1, 2 and 3, of Publication No. 3, of the United States Fuel Administration, Establishing Jobbers' Margins.

The following regulations shall apply to the intrastate, interstate, and foreign commerce of the United States, and the prices and margins referred to herein shall be in force pending further investigation or determination thereof by the President:

Jobber's Margins.

1. A coal jobber is defined as a person (or other agency) who purchases and resells coal to coal dealers or to consumers without physically handling it on, over, or through his own vehicle, dock, trestle, or yard.

2. For the buying and selling of bituminous coal a jobber shall not add to his purchase price a gross margin

in excess of 15 cents per ton of 2000 pounds, nor shall the combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of bituminous coal exceed 15 cents per ton of 2000 pounds.

3. For buying and selling anthracite coal a jobber shall not add to his purchase price a gross margin in excess of 20 cents per ton of 2240 pounds when delivery of such coal is to be effected at or east of Buffalo. For buying or selling anthracite coal for delivery west of Buffalo a jobber shall not add to his purchase price a gross margin in excess of 30 cents per ton of 2240 lbs. The combined gross margins of any number of jobbers who buy and sell a given shipment or shipments of anthracite coal for delivery at or east of Buffalo shall not exceed 20 cents per ton of 2240 pounds, nor shall such combined margins exceed 30 cents per ton of 2240 pounds for the delivery of anthracite coal west of Buffalo. Provided that a jobber's gross margin realized on a given shipment or shipments of anthracite coal may be increased by not more than 5 cents per ton of 2240 pounds when the jobber incurs the expense of rescreening it at Atlantic or lake ports for transhipment by water.

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Woodrow Wilson.

The White House, August 23, 1917.

Order of October 6, 1917.

Washington, D. C., October 6, 1917.

The following orders, rulings, and regulations relating to coal prices and governing the sale, shipment, and distribution of coal are promulgated by the United States

Fuel Administrator on behalf of the President under the authority of the act of Congress approved August 10, 1917, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," and an Executive order of the President dated August 23, 1917, appointing said Fuel Administrator.

* * * * * * * * * *

2. Contracts relating to bituminous coal made before the President's proclamation of August 21, 1917, and contracts relating to anthracite coal made before the President's proclamation of August 23, 1917, shall not be affected by these proclamations, provided the contracts are bona fide in character and enforceable at law, in the absence of further express regulation.

3. If the claim is made that any specific coal has been acquired in accordance with a bona fide contract enforceable at law existing prior to the time of the order of the President applicable thereto, the burden of proof is upon the parties to the contract to establish these facts.

4. Coal may be bought and sold at prices lower than those prescribed by the orders of the President.

5. The effect of the President's orders on coal rolling when the order affecting such coal was issued is to be decided by first ascertaining whether or not the title had passed from the operator to the consignee at the time the President's order became effective. If the title had passed to the consignee, the price fixed by the President does not apply.

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8. A jobber who had already contracted to buy coal at the time of the President's order fixing the price of such coal, and who was at that time already under contract to sell the same, may fill his contracts to sell at the price named therein.

9. A jobber who, at the time of the President's order fixing the price of the coal in question at the mine, had contracted to buy coal at or below the President's price, and at that time had no contract to sell such coal, shall not sell the same at a price higher than the purchase price plus the proper jobber's commission as determined by the President's regulation of August 23, 1917.

10. A jobber who, at the time of the President's order fixing the price of the coal in question, was under contract to deliver such coal at a price higher than a price represented by the price fixed by the President or the Fuel Administrator for such coal plus a proper jobber's commission as determined by the President's regulation of August 23, 1917, shall not fill such contract at a price in excess of the President's price plus the proper jobber's commission, with coal purchased after the President's order became effective and not contracted for prior thereto.

11. A jobber who, at the date of the President's order fixing the price of the coal in question, held a contract for the purchase of coal without having already sold such coal, shall not sell such coal at more than the price fixed by the President or the Fuel Administrator for the sale of such coal after the date of such order, plus the jobber's commission as fixed by the President's regulation of August 23, 1917.

* * * * * * * * * *

20. An assignment of a contract for the sale of coal, where such assignment is made after the President's order applicable to the price of the coal covered by the contract shall be treated as a sale of coal and be subject to all the orders and regulations of the President of the United States and the Fuel Administrator relating thereto.

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H. A. Garfield,
United States Fuel Administrator.

Order of September 6, 1917.

Order of the United States Fuel Administrator of Sept. 6, 1917, Issued as Paragraph 7 of Publication No. 5 of the United States Fuel Administration, Permitting the Filling, at the Contract Price of Contracts Bona Fide in Character and Enforcible at Law, Entered into Prior to the Executive Orders of August 21, 1917, and August 23, 1917, for the Sale of Bituminous and Anthracite Coal, Respectively.

September 6, 1917.

* * * * * * * * * * *

7. Contracts relating to bituminous coal made before the proclamation of the President on August 21, and contracts relating to anthracite coal made before the President's proclamation of August 23, are not affected by these proclamations, provided the contracts are bona fide in character and are enforcible at law.

The undersigned has requested the Federal Trade Commission to secure at the earliest moment possible a certified copy of all contracts held to come within the foregoing rule.

H. A. Garfield,
United States Fuel Administrator.

Order of September 7, 1917.

Statement of United States Fuel Administrator, Dated September 7, 1917, Issued as Publication No. 6 of the United States Fuel Administration, in Regard to Mode of Organization of Local Fuel Administrations.

Washington, D. C., September 7, 1917.

The Fuel Administration realizes the acute need of making immediate arrangements to apportion the coal supply and regulate the retail sale of coal. To this end the following plan has been adopted:

The Fuel Administrator is immediately to choose a representative of the Fuel Administration in each State and Territory. He will also appoint in each State, in conjunction with the State representative, a committee of citizens, who, with the representative, will assume direction of the regulation of the sale of coal in that State. No person will be appointed, either as a State representative, or on any of these committees, or any of the committees mentioned below, who is connected with the local coal industry.

Each State representative as soon as appointed will choose a committee of citizens to represent the Fuel

Administration in each county of the State and in each city in the State having more than 2500 population, or such other population as the State Fuel Administrator may determine.

The State representative and the State committee will be chosen directly by the Fuel Administrator with the approval of the President.

The county committees and the city committees will be chosen directly by the State representative.

The State committee will at once ascertain the amount of coal in the State available for use during the coming winter and the amount of coal needed to meet any deficiency in the supply, based on last year's consumption.

It will be the duty of the various committees to ascertain and report to the Fuel Administration the reasonable retail margin (viz., the cost of local distribution and a reasonable delears' profit to be allowed). This margin, when duly fixed by order, together with the cost at the mine named by the President, the transportation charge, and the jobber's commission, when sold through a jobber, will constitute the price to the consumer. The Fuel Administration will make public from its local committees in each community sufficient data to enable the individual consumer to ascertain for himself the established price.

These figures will be compiled with relation to local needs in order that the Fuel Administration may, if necessary, apportion the supply of coal with careful regard to the greatest existing needs. There are many com-

munities today in which there is no supply of coal available at retail prices.

A very large proportion of the coal supply available for the coming winter is under contract. These contracts, which are allowed to stand for the present, were made prior to the President's proclamation and very largely limit the amount which may be placed on sale at retail prices based on the President's order.

It is absolutely essential, however, that a sufficient amount of coal be put on the market at once at these prices to meet the needs of domestic consumers. The Fuel Administration believes that this supply of coal can be made available and will be made available by voluntary arrangement between the operators and those with whom they have contracts, and thus make it unnecessary for the Fuel Administration to exercise or recommend the exercise of the powers provided in the Lever Act.